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IN THE

Supreme Court of the United States

October Term, 1954

No. 919

Eugene K. Friedman, *Petitioner*,

vs.

THE UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI
TO THE
UNITED STATES COURT OF CLAIMS

EUGENE K. FRIEDMAN
[illegible]
Petitioner

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IN THE

Supreme Court of the United States

October Term, 1966

No.....

Eugene K. Friedman, *Petitioner*

v.

THE UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

Your petitioner, Eugene K. Friedman, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Claims in the above-entitled cause dated May 2, 1966, and October 14, 1966.

OPINIONS BELOW

The opinions of the court below decided May 2, 1966 and October 14, 1966 (Appendix A. *infra,* 1-2) have not yet been reported.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1255(1).

QUESTIONS PRESENTED

1. The Government and the Court below have taken the position that a temporary employee assumes the risk of arbitrary, capricious and bad faith discharge. Does this view violate the Due Process Clause of the Fifth Amendment?

2. Is it a violation of the Veterans' Preference Act of 1944, 58 Stat. 387, to deliberately and avowedly refuse to convert a veteran to career status solely because this would give him an "unfair" advantage over non-veterans?

3. Does an omission to act, in violation of an executive personnel regulation of the Federal Aviation Agency, create a right of action in the employee, and is the contra opinion below in conflict with 28 U.S.C. Sec. 1491 and this Court's rulings in *Service v. Dulles*, 354 U.S. 363 (1957), and *Watson v. United States*, 355 U.S. 14 (1957)?

CONSTITUTIONAL PROVISION, STATUTES, AND REGULATION INVOLVED

The pertinent constitutional provision, statutes, and regulation involved in this case are set forth in Appendix B., *infra*, 3-6.

STATEMENT

1. On October 2, 1958, plaintiff was employed by the RCA Service Company as a civil engineer and assigned to work in this capacity for the Federal Aviation Agency under a service contract between RCA and FAA. Plaintiff was outstandingly proficient at surveying and leasing sites for air navigation facilities, and was soon made a subordinate supervisor in these activities. In 1963, the FAA decided to provide all of its own engineers, and plaintiff was given notice by RCA that as of c.o.b October 4, 1963, his services would no longer be needed.

2. On October 3, 1963, the Chief of FAA's Real Estate & Utilities Section contacted plaintiff and advised him that, in view of his familiarity with FAA leasing procedures, the FAA wanted to hire him.

3. It was agreed between the parties that plaintiff would accept employment with the FAA on a temporary basis, and that if he performed his responsibilities successfully, he would be given career employment, provided his name was available on a Civil Service register. And it was further agreed that the FAA

would do everything possible to bring about this result. This agreement and plaintiff's successful job performance were later confirmed in a *To Whom It May Concern* letter written by said Section Chief. (Pl. Ex. H; R. 24, 52-53)

4. On October 7, 1963, the FAA gave plaintiff a temporary appoinment, not to exceed one year, as a Realty Specialist, GS-11.

5. On January 5, 1964, plaintiff was told that he was performing his duties well, and was given a TAPER appointment (temporary appointment pending establisment of a register.) This was a more advantageous type of temporary appointment meant to reward plaintiff for his efficient work until such time as he could qualify for career appointment.

6. In April of 1964, plaintiff was offered reemployment by the RCA Service Company at a raise in pay, but refused because he had been told that his conversion to career employment was assured as soon as he could get on an appropriate Civil Service register.

7. Also in April of 1964, plaintiff scored above 1200 on the Princeton Graduate Record Examination, which permanently qualified him for the Federal Service Entrance Examination register. In May of 1964, plaintiff passed the FSEE directly, which placed his name on the FSEE register. Thereafter, plaintiff notified his superiors and the FAA personnel department of his success in these examinations, either of which

qualified him for conversion to career status in accordance with the original agreement between the parties.

8. After plaintiff had made many requests for conversion, this action was finally started in May of 1965. Plaintiff's Branch Chief ordered his conversion, and plaintiff's name was certified to the FAA by the Civil Service Commission. At this point, plaintiff's Division Chief countermanded his Branch Chief's order and refused to convert plaintiff stating instead that he intended to discharge him.

9. When plaintiff met with his Division Chief on June 18, 1965, to ask for reconsideration he was told:

> "You are a veteran and if you were to be given permanent status as a GS-11, you would be able to bump a non-veteran with 20 years' service, such as Anne Hopkins. I don't think that would be fair." (Pl. Ex. O; R. 24, 60-61)

10. A month later, on July 19, 1965, plaintiff received a letter from his Division Chief terminating his employment c.o.b. August 31, 1965. The official personnel records give "lack of funds" as the reason for plaintiff's discharge.

11. On October 15, 1965, plaintiff filed an action in the United States Court of Claims for loss of salary alleging arbitrary and capricious discharge in violation of: (1) the Veterans' Preference Act of 1944, (2)

an employment contract, and (3) personnel regulations calling for conversion under plaintiff's circumstances. (R. 1-3)

12. On May 2, 1966, the Court of Claims granted defendant's motion for summary judgment concluding that there was no statutory or regulatory basis under which plaintiff could recover. (R. 23)

13. On July 29, 1966, plaintiff filed a petition for reconsideration and motion for summary judgment (R. 24-61) which was denied without explanation on October 14, 1966. (R. 70-71)

REASONS FOR GRANTING WRIT

Petitioner advances three main arguments for the granting of this writ, and requests three corresponding holdings in the belief that each requested holding is necessary to the preservation of a class right. But if he had to choose one holding only, petitioner would choose to have the Court say that any arbitrary interference by the government with a person's right to employment is a violation of the Due Process Clause of the Fifth Amendment.

I

The right to one's job is a property right within the meaning of the Fifth Amendment; the government cannot, therefore, abridge this right without due process of law.

The importance of affirming this concept lies in the fact that almost every employed person is vulnerable to government regulations which affect his capacity to be employed. Without such a concept many employees, such as those who are temporary, probationary, or need government approval to be employable, will be without a remedy for even the most malicious and arbitrary rulings of government officials. Plaintiff's case is a good example — since he was not in a class *specifically* protected by statute or regulation, the Court of Claims denied him recourse for a dismissal that was unquestionably arbitrary and malicious. Such a result is repugnant to the basic principles of our society.

In *Cafeteria Workers v. McElroy,* 367 U.S. 886 (1961), this Court looked with favor on the concept of employment as a property right protected by the Due Process Clause of the Fifth Amendment. That case fell short of a due process ruling for lack of evidence that the Government's action was arbitrary or discriminatory. In the instant case there is no such disability.

II

It is a violation of the Veterans' Preference Act of 1944, 58 Stat. 387, to deliberately circumvent its purpose by refusing to convert a veteran to career status.

It would seem self-evident that there can be no greater violation of the Veterans' Preference Act than to refuse to employ a man because he is a veteran. Yet the Court of Claims, by taking a narrow technical view of who is entitled to protection under the Act, has decided that such behavior creates no cause of action in a temporary employee. It is true, of course, that Section 14 of the Act [5 U.S.C. Sec. 863 (1964)] applies procedural safeguards against discharge only to one who is a "permanent or indefinite preference eligible," but the Act also states that:

> "In certification for appointment, in appointment, in reinstatement, in reemployment, and in retention in civilian positions in all establishments, agencies, bureaus, administrations, projects and departments of the Government, permanent or temporary, and in either (a) the classified civil service; (b) the unclassified civil service; (c) any temporary or emergency establishment * * * preference shall be given to * * * *(4) those ex-servicemen * ** who have served on active duty in any branch of the armed forces of the United States, during any war * * * and have been separated therefrom under honorable conditions." Sec. 2, 58 Stat. 387 (1944); 5 U.S.C. Sec. 851 (1964).

In view of this quotation, it must be conceded that to discriminate against a veteran, *temporary or permanent* in Government employment, violates not only the letter of the law, but its whole spirit and intent as well. A decision holding otherwise is manifestly erroneous. As Mr. Justice Frankfurter said, "He [a veteran] is not to be disadvantaged by serving his country."[1] Also, as Mr. Justice Clark said concerning the circumvention of statutes, "And that which cannot be done by express statutory prohibition cannot be done by indirection."[2]

The ruling on this point will affect many veterans, because it is only human nature for non-veterans to resent and resist the application of the Veterans' Preference Act. And if this discriminatory practice cannot be refuted, then a large and ever increasing number of veterans will never realize the preference a grateful people sought to give them.

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[1] *McKinney v. Missouri-Kansas-Texas R. Co.*, 357 U.S. at 270.
[2] *Anderson v. Martin*, 375 U.S. at 404.

III

When an act is required by executive regulation, an omission to act by the employing agency creates a right of action in the employee, and the opposite holding by the Court below is in conflict wth 28 U.S.C. Sec. 1491 and the Supreme Court's rulings in Service v. Dulles, 354 U.S. 363 (1957), and Watson v. United States, 355 U.S. 14 (1957).

In ruling that there is no regulatory basis for a recovery by the plaintiff, the Court of Claims seems to have ignored 28 U.S.C. Sec. 1491, which provides that the Court of Claims shall have jurisdiction to render judgment on *any* claim against the United States founded on *any* regulation of an executive department. Plaintiff has such a claim, and a corresponding right to relief, as evidenced by the following FAA personnel regulation.

> "*RETENTION OF EMPLOYEES SERVING UNDER TEMPORARY APPOINTMENT.* The work performance of temporary employees, including those with handicaps, shall be carefully reviewed to determine their fitness for continued employment. When appropriate, every effort shall be made to convert a temporary to a permanent appointment if a suitable vacancy exists, providing the employee can be reached on an appropriate civil service register prior to the expiration of the temporary appointment." Paragraph 201, Chapter

2, FAA Internal Placement Handbook (PT P 3330.9), dated November 3, 1964. (Pl. Ex. D; R. 24, 47-48)[3]

Since plaintiff was in all respects within that class of employees to be converted, the Court of Claims' ruling is equivalent to holding that an omission to act, even in the face of a regulatory duty to do so, creates no right of action in the employee. Plaintiff believes that this is not only in direct conflict with 28 U.S.C. Sec. 1491, but also with the Supreme Court's rulings in *Service v. Dulles,* 354 U.S. 363 (1957), and *Watson v. United States,* 355 U.S. 14 (1957).

In the *Service* case, this Court ruled that once having chosen a certain set of regulations, petitioner's supervisors must abide by them.

In the *Watson* case, this Court held that failure to supply plaintiff with a "statement of reasons," as required by regulation, made her discharge procedurally defective.

If the present holding of the Court of Claims is allowed to stand, then the rulings in the *Service* and *Watson* cases will be narrowed to exclude those employees who are injured by the wrongful inaction of their employing agency. This would not only be unjust, but would present very real problems in drawing the line between inactions and defective actions. This is ap-

[3]This regulation is basically authorized by the Federal Aviation Act of 1958, as amended, Secs. 302(f), 303(d), and 313(a), 72 Stat. 731; 49 U.S.C. Secs. 1343(d), 1344(d), and 1354(a) (1964).

parent from the circumstance that most defective personnel actions are defective because one or more required steps were omitted.

The importance of turning back this attack on the rights of Government employees is very great indeed, because if the argument supporting the attack is adopted, almost every regulatory infraction could be considered an omission to act. Consequently, this ruling of the Court of Claims could topple the whole structure of executive regulations. Such a possibility calls for corrective action.

CONCLUSION

The premises considered, it is respectfully requested that this Petition for a Writ of Certiorari be granted.

EUGENE K. FRIEDMAN, pro se

241 South Oakhurst Drive
Beverly Hills, California

APPENDIX A

IN THE UNITED STATES COURT OF CLAIMS

No. 361-65

EUGENE K. FRIEDMAN)
v.)
THE UNITED STATES)

Before COWEN, Chief Judge, LARAMORE, DURFEE, DAVIS and COLLINS, Judges.

ORDER

This case comes before the court on defendant's motion for summary judgment. Upon consideration thereof, together with the opposition thereto, and without oral argument, on the authority of *Bennett v. Udall,* 301 F. 2d 532 (D.C. Cir. 1962), it is concluded that there is no statutory or regulatory basis for plaintiff's claim, and

IT IS ORDERED that defendant's motion for summary judgment be and the same is granted and plaintiff's petition is dismissed.

BY THE COURT

/s/

WILSON COWEN

Chief Judge

IN THE UNITED STATES COURT OF CLAIMS

* * * * * *	)	v.
	)	THE
* * * * * *	)	UNITED
361-65 EUGENE K. FRIEDMAN	)	STATES

Before COWEN, Chief Judge, LARAMORE, DURFEE, DAVIS and COLLINS, Judges, * * *.

ORDER

These cases come before the court on motions for rehearing, new trial, reconsideration, to strike opinion and dismiss proceedings, to vacate judgment and for entry of different judgment, for amendment of judgment, for remand to the commissioner for further testimony and findings and for summary judgment under Rules 68 and 69 of the Rules of this court and, on consideration thereof,

IT IS ORDERED this 14 day of October, 1966, that said motions be and the same are denied as follows:

* * * * * *

* * * * * *

361-65 Eugene K. Friedman. Plaintiff's petition for reconsideration and motion for summary judgment.

BY THE COURT

/s/

WILSON COWEN

Chief Judge

APPENDIX B

CONSTITUTIONAL PROVISION, STATUTES AND REGULATION

1. Constiutional Provision

The United States Constitution, Fifth Amendment, provides in pertinent part:

> "No person shall be * * * deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation."

2. Statutes

The Veterans' Preference Act of June 27, 1944, as amended, Sec. 2, 58 Stat. 387; 5 U.S.C. Sec. 851 (1964), provides in pertinent part:

> "In certification for appointment, in appointment, in reinstatement, in re-employment, and in retention in civilian positions in all establishments, agencies, bureaus, and administrations, projects and departments of the Government, permanent or temporary, and in either (a) the classified civil service; (b) the unclassified civil service; (c) any temporary or emergency establishment * * * preference shall be given to * * * (4) those ex-servicemen * * * who have served on active duty in any branch of the armed forces of the United States, during any war * * * and have been separated therefrom under honorable conditions."

Section 14 of said Veterans' Preference Act, 5 U.S.C. Sec. 863 (1964), provides in pertinent part:

> "No permanent or indefinite preference eligible, who has completed a probationary or trial period employed in the civil service, or in any establishment, agency, bureau, administration, project, or department, hereinbefore referred to shall be discharged, suspended for more than thirty days, furloughed without pay, reduced in rank or compensation, or debarred from future appointment, except for such cause as will promote the efficiency of the service * * *."

The Tucker Act (Claims) 28 U.S.C. Sec. 1491, provides in pertinent part:

> "The Court of Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, * * *."

The Federal Aviation Act of August 23, 1958, as amended, Sec. 302 (f), 72 Stat. 731; 49 U.S.C. Sec. 1343(d), provides in pertinent part:

> "The Administrator is authorized, subject to the civil-service and classification laws, to select, employ, appoint, and fix the compensation of such officers, employees, attorneys, and agents as shall be necessary to carry out the provisions of this Act, and to define their authority and duties, * * *."

Section 303 (d) of said Federal Aviation Act, 49 U.S.C. Sec. 1344 (d) (1964), provides in pertinent part:

> "The Administrator may, subject to such regulations, supervision, and review as he may prescribe, from time to time make such provision as he shall deem appropriate authorizing the performance by any officer, employee, or administrative unit under his jurisdiction of any function under this Act, * * *."

Section 313(a) of said Federal Aviation Act, 49 U.S.C. Sec.1354(a) (1964), provides:

> "The Administrator is empowered to perform such acts, to conduct such investigation, to issue and amend such orders, and to make and amend such general or special rules, regulations, and procedures, pursuant to and consistent with the provisions of this Act, as he shall deem necessary to carry out the provisions of, and to exercise and perform his powers and duties under, this Act."

3. Regulation

Paragraph 201, Chapter 2 of the FAA Internal Placement Handbook, (PT 3330.9) dated November 3, 1964, provides:

> *"RETENTION OF EMPLOYEES SERVING UNDER TEMPORARY APPOINTMENT.* The work performance of temporary employees, including those with handicaps, shall be carefully reviewed to determine their fitness for continued

employment. When appropriate, every effort shall be made to convert a temporary to a permanent appointment if a suitable vacancy exists, providing the employee can be reached on an appropriate civil service register prior to the expiration of the temporary appointment."

In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 919

EUGENE K. FRIEDMAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

On October 7, 1963, petitioner was hired by the Federal Aviation Agency ("FAA") as a Realty Specialist (GS–11) under a temporary appointment not to exceed one year. On January 5, 1964, his appointment was converted to what is known as a TAPER appointment—a "temporary appointment pending establishment of a register" of persons eligible under Civil Service regulations to fill that position (R. 14). Petitioner retained that temporary position until August 31, 1965, when his employment was terminated because a career employee who had been serving in Alaska exercised his right to return to his former position and the agency was unable, "due to lack of

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funds," to offer petitioner any other comparable position (R. 17). Petitioner thereupon instituted this action in the Court of Claims, alleging that he had been wrongfully separated from his employment. The Court of Claims granted the government's motion for summary judgment on the ground that "there is no statutory or regulatory basis for plaintiff's claim" (Pet. App. 1).

The decision of the court below is plainly correct. The documents filed in support of the government's motion for summary judgment—the truth of which was not challenged by petitioner—refute the allegation that petitioner's separation from employment was arbitrary or malicious (Pet. 7). Petitioner's employment was terminated in accordance with applicable regulations and in a manner which did not reflect adversely upon his character or work performance.

Nor is there substance to the claim (Pet. 8–9) that the termination was occasioned by the fact that he was a veteran [1] or that it violated petitioner's rights under the Veterans' Preference Act, 5 U.S.C. 851 *et seq.* (1964 ed.). Petitioner was not entitled by that Act to replace classified career employees with many years of service, and that is what he was allegedly told by his division chief (Pet. 5). Even the evidence prepared and relied upon by petitioner discloses that FAA had no openings to which petitioner could be appointed at the

[1] Petitioner's contention that he was denied a permanent appointment because he was a veteran was raised for the first time in his Petition for Reconsideration in the Court of Claims. The court's decision granting summary judgment for the government did not, therefore, reflect that contention.

time of his separation (R. 60–61). The Act accorded him no right to employment in those circumstances.

Finally, this case involves no violation of Civil Service regulations (Pet. 10–12). As a TAPER employee, petitioner was not in a permanent classified status. *Bennett* v. *Udall*, 301 F. 2d 532 (C.A.D.C.). He could properly be "separated at any time upon notice in writing from an appointing officer." Federal Personnel Manual, Chapter 316–5, Subchapter 2, Section 2–2. The exhortation in the FAA Internal Placement Handbook which urges supervisors to make "every effort * * * to convert a temporary to a permanent appointment if a suitable vacancy exists * * *" (Pet. 10–11) plainly give temporary appointees no absolute right to demand such an appointment.[2]

For the foregoing reasons, we respectfully submit that the petition for a writ of certiorari should be denied.

THURGOOD MARSHALL,
Solicitor General.

JANUARY 1967.

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[2] Petitioner does not appear to contend in this Court, as he did below, that FAA was bound to give him a permanent appointment because of the representation of his supervisor that he would do "all in [his] power" to place him in a permanent position (R. 52). Even if this had amounted to an informal oral agreement—and we submit it fell far short of that—it would give petitioner no right to such a position. See, *e.g.*, *Utah Power & Light Co.* v. *United States*, 243 U.S. 389, 409; *Barnes* v. *United States*, 138 Ct. Cl. 76, 80.

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